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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9

10 FIREMAN'S FUND INSURANCE
COMPANY, a foreign corporation a/s/o
11 BASIC RESOURCES, INC. and GEORGE
REED, INC., a foreign corporation,
12

13 Plaintiff,

14 vs.

15 GERLING AMERICA INSURANCE
COMPANY, a foreign corporation,
16

17 Defendant.
18

CASE NO.: 3:07-cv-06302-CRB

19 **DEFENDANT GERLING AMERICA**
INSURANCE COMPANY'S NOTICE OF
MOTION AND MOTION FOR LEAVE OF
COURT TO FILE SECOND AMENDED
COMPLAINT [F.R.C.P 15(a)(2)]

20 Date: August 1, 2008
Time: 10:00 a.m.
Courtroom: 8
21

22 TO THE HONORABLE COURT AND TO PLAINTIFF AND ITS COUNSEL OF
23 RECORD:
24

25 PLEASE TAKE NOTE THAT, on August 1, 2008, at 10:00 a.m., or as soon thereafter as
26 the matter may be heard in Courtroom 8 before the Honorable Judge Charles R. Breyer at the
27 above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94012,
28 Defendant Gerling America Insurance Company will and hereby do move this Court as follows:

For an order granting Defendant Gerling leave to file its Second Amended Answer.

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Defendant Gerling's Motion for Leave of Court to File Second Amended Answer
3:07-cv-06302-CRB

1 This motion is based on the Notice of Motion, Memorandum of Points and Authorities filed
2 herewith, the Declaration of Tino X. Do, the pleadings and papers filed herein, the pleadings and
3 records in this case, and such other matters as the Court may deem appropriate.

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5 Dated: June 27, 2008

BARGER & WOLEN LLP

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7 By: /s/ Tino Do
8 THOMAS R. BEER
9 TINO X. DO
10 Attorneys for Defendant GERLING
11 AMERICA INSURANCE COMPANY
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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Defendant Gerling America Insurance Company ("Gerling") moves this Court for leave to file its Second Amended Answer.

2. ARGUMENT

A. Plaintiff Will Not Suffer Any Prejudice With the Filing of This Amended Answer

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend should be freely given "when justice so requires." Federal policy strongly favors determination of cases on their merits, and leave to amend pleadings is freely given unless the opposing party makes a showing of undue prejudice, or bad faith or dilatory motive on the part of the moving party. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In this case, Gerling's only amendments to its Answer is the withdraw of the affirmative defenses of "Damage to Your Property Exclusion" and "Exhaustion of Policy Limits." Amendment is necessary because Gerling has determined that these affirmative defenses are not applicable to the claims at issue in this case. Given that this amendment only means that Plaintiff Fireman's Fund Insurance Company ("FFIC") has two less affirmative defenses to overcome, FFIC cannot claim prejudice, bad faith or dilatory motive with this amendment. Additionally, the issue of futility of amendment is not applicable in this situation where the amendment simply withdraws affirmative defenses.

3. CONCLUSION

For the foregoing reasons, Gerling respectfully requests that the Court grant Gerling leave to file its Second Amended Answer.

Dated: June 27, 2008

BARGER & WOLEN LLP

By: /s/ Tino X. Do
THOMAS R. BEER
TINO X. DO
Attorneys for Defendant GERLING
AMERICA INSURANCE COMPANY